

The Spanish Constitutional Crisis: Law, Legitimacy and Popular Sovereignty in Question

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The Spanish constitutional crisis is escalating, and it has now – finally – found broader attention, thanks to the referendum on 1 October and the violence of the Spanish police trying to prevent it from being held. Still, much confusion reigns on how to approach the crisis, apart from the obvious condemnation of the human rights violations during the referendum and in the weeks leading up to it. Having been a close observer of the unfolding crisis for the last decade, here some attempts at clarification.

The most obvious confusion concerns the question of legality in the conflict. It is relatively undisputed that the referendum violated the Spanish constitution – procedurally, as the application of the statute providing for the referendum had been provisionally suspended by the constitutional court, but most likely also in substance as the referendum would have required the consent of the Spanish parliament and, anyway, clashed with the constitutional guarantee of the ‘indissoluble unity’ of the Spanish nation. But this is not the end of the matter in terms of law as the Spanish legal order is no longer alone in claiming validity in Catalonia. The Catalan regional parliament has asserted the supremacy of Catalan law, and when it comes to the referendum, and the ensuing questions regarding a declaration of independence, Catalan law claims to trump Spanish law – a claim apparently accepted by the more than two million Catalans taking part in the referendum. As Maximilian Steinbeis has highlighted in his recent insightful [report](#) on the referendum, in a revolutionary situation like this, there is no way of knowing which of the competing legalities is ‘the law in force’. The Spanish constitutional court is certainly not in a position to determine this conclusively – being the guarantor of one legal system, but not the other, it is less an impartial arbiter than a party to the conflict. So, only time will tell, and all will depend on the effective support of one or the other system by the institutions and the population itself.

Secondly, there is much confusion over the international law side of the conflict. It is by now quite clear – especially in light of the Kosovo Advisory Opinion of the International Court of Justice – that a declaration of independence would not violate international law. But does the international legal order grant Catalans also a right to secede? The principle of self-determination of peoples, enshrined in the UN Charter, the human rights covenants, and customary international law, is often interpreted as providing for a right to secession only in colonial contexts and, potentially, in cases of remedial secession when grave human rights violations and political oppression are at stake. But the text of the relevant provisions is not clear in this respect, and, as also noted by Zoran Oklopčič in his recent [post](#), it is questionable whether, in an age of democracy, we should keep interpreting it in this restrictive way – in a way which is, naturally, favoured by governments interested in maintaining the unity of their territories. Peoples around the world – the Catalans among them – have taken the principle to bear a broader promise, one including the possibility of ‘the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people’, as the UN’s Friendly Relations Declaration puts it. Even if this might not imply outright secession, it should require governments to enter into a good-faith dialogue with the peoples concerned about the ways in which their self-determination can be realized – something the Spanish government has refused for years now despite numerous calls for it from the Catalan side – and potentially secession if that dialogue does not take place.

Yet the Spanish constitutional crisis concerns issues that go well beyond the question of legality, and the excessive focus on the law – by the Spanish government as well as many commentators – has obscured more fundamental issues of legitimacy and democracy. The accordance with law or constitutional rules may be an indicator of legitimacy, but only if the law itself is legitimate. If the law is unjust, there is no reason why anyone would be obliged to follow it. And thus, the question here is: is the Spanish constitution the legitimate yardstick for the actors involved? This is doubtful for two reasons, one historical, one democratic. Historically, the Spanish constitution of 1978 is a product of a transition to democracy and, far from being the result of a deliberation of

free and equal citizens, it was negotiated in the shadow of a possible return of Francoist forces, and in particular the possibility of a military coup (a very real threat, as the actual *coup d'état* in 1981 demonstrated). Various elements in the constitution – among them the position of the monarchy, the emphasis on the unity of Spain, the weak status of the autonomous regions, or the role of the military as a guarantor of the constitutional order – are best understood on this background. A document which, at the time, was accepted by many merely for fear of the alternatives, does not have a particularly strong claim to authority four decades later.

Yet there are deeper reasons of democracy and popular sovereignty that undermine the claim of the Spanish constitution to be the yardstick in the conflict. Like other constitutions, the Spanish one claims to be based on the *pouvoir constituant* of the people, in this case the Spanish people in which, according to Article 1 of the constitution, 'national sovereignty resides'. Yet this is a mere stipulation – the *pouvoir constituant* is always a social construction, a retrospective ascription to a body that does not exist as such. In some ways, as I've tried to argue [elsewhere](#), constituent power is always a fiction, though one with more or less resonance in societal beliefs. Most of the 'peoples' at the basis of Europe's constitutions have been formed through nation-building processes over centuries, with varying degrees of violence and varying degrees of success. Feelings of belonging to the broader 'nation' have always been limited in places like the Bretagne, Corsica, Scotland, Bavaria, Sardinia, Veneto, the Basque country, or Catalonia. And the boundaries of Europe's 'peoples' – like elsewhere – have often been defined by historical accidents and force rather than by free choice.

On this background, the scope of the *demos* in many democracies is, as a matter of normative judgment, fundamentally open. Where its boundaries lie has to be defined by the people themselves, through processes of collective identification and distancing. This is what has happened over the last years in Catalonia where a persistent feeling of cultural, linguistic, and political difference, a sense of discrimination on many fronts, and a string of rejections and repressive moves by the Spanish state, have led to a re-identification of many, and to a widespread conviction that it is for the Catalan people to decide their future themselves. Neus Torbisco has traced the ideational bases of these process in an illuminating recent [paper](#). The liberal nationalism that has emerged from this process is far from exclusive – independentists favour integration in the EU and a very open conception of citizenship – and it has widespread support. According to polls, 70 percent of Catalans believe this future ought to be decided in a referendum in Catalonia. Many of them would nevertheless vote for remaining in Spain – support for independence itself stood at around 50 percent or a bit below in polls earlier this year, though the events of the last few weeks are likely to have changed the picture significantly. Around 90 percent of those participating in last week's referendum voted for independence, but of course, this picture suffers from the fact that the referendum itself took place in non-ideal conditions because of the intervention of the Spanish government. Yet the clear majority in favour of a referendum – and the strong participation in it, despite the declared illegality and the efforts of the Spanish police to disrupt it – signal a shift towards a new understanding of the *pouvoir constituant* and its ability to express itself directly, outside of constitutional constraints (see also Stephen Tierney's [comment](#) on the increasing use of referenda to challenge constitutional form).

Independentism would certainly be weaker if there were a prospect of meaningful autonomy – on cultural, educational, economic and financial matters, in particular. Some of this could be achieved through ordinary legislation, some through constitutional change (even if the latter is notoriously difficult under the Spanish constitution). Instead, the Spanish government has undertaken a progressive recentralization over the past years, some specifically aimed at eliminating regional difference (education policy was, according to the then minister of education, partly [designed](#) to 'españolizar' – to turn into Spaniards – Catalan school children). Spain is, after all, not a federal state, and the autonomy of the regions remains limited and is mostly at the mercy of the central government; national legislation can determine policy in most areas in enormous detail, leaving little space for regions to define their own course of action; regions largely depend on the national government for their budgets; and they have very limited influence on the national political process. Yet the many Catalan calls for rebalancing the edifice of the Spanish state in favour of greater autonomy have been consistently rejected over the last decade, driving people to seek greater autonomy outside rather than inside Spain. And certainly fortifying the conviction of most that it should be for Catalans to determine their future for themselves – that the relevant *demos* here is the people of Catalonia, not that of Spain as a whole.

The existence, or emergence, of different *demos* on a territory need not spell disintegration, as we can see in the many multinational states in which coexistence is peaceful. But respecting democracy in a multi-*demos* setting

requires respect for each other, mutual accommodation and a spirit of openness and dialogue – in short, some form of a politics of [recognition](#). Canada and Britain have followed this approach, and they have been able to convince the Québécois and Scots to stay. The Spanish government has, unfortunately, chosen a confrontational path, rejecting any meaningful dialogue for years and opting for repressive law-enforcement rather than respect. (Not all of its strategies were themselves within the law – some, like the clandestine attempt to ‘destroy the Catalan health system’, or efforts to falsely discredit independentist leaders in election campaigns, were clear violations.) The Spanish constitutional court itself has played its part in this process with its fateful rejection of the new regional constitution, the Estatut, in 2010. And even after last week’s referendum, the government in Madrid has not been able to see that the Catalans’ attempt to define their own future is not ‘blackmail’ by a few separatist leaders but a broad collective effort that seeks to exercise a democratically-founded right to self-determination. Rather inexplicably, the Spanish government seems stuck in a quasi-imperial mindset in which it regards Catalonia merely as a rebellious province that has to be subdued through the use of the police and the criminal law. In the face of this, Catalan regional leaders have called for mediation and a constitutional reform dialogue on several occasions since the referendum, but they have fallen on deaf ears. This tough stance is likely to gain the governing *Partido Popular* votes in other regions, but unless it changes its attitude, Spain will lose not only the allegiance of many Catalans but also any claim that the Catalans should pursue their aspirations within the Spanish constitutional order rather than through a declaration of independence.

Is this an issue for the European Union, and the international community, to get involved in? Very clearly yes – human rights, democracy and self-determination are of international concern and not merely issues internal to Spain. If the European Union is indeed ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’, as Article 2 of the Treaty on European Union promises, it would ignore this conflict at its peril. Democratic arguments over the shape of the member states of the European Union are likely to recur, and there has to be a process that deals with them constructively. In the Catalan case, European or international mediation may be able to bring both parties to the table. If on the other hand, the current calls for dialogue continue to go unheeded and Catalonia declares independence, its claim to a place in the EU, and in the community of nations more broadly, will not be easy to dismiss.

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